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82-1740

No. ..-...

IN THE

Supreme Court of the United States

October Term, 1982

CHER,

Petitioner,

vs.

NEWS GROUP PUBLICATIONS, INC., a Delaware corporation, doing business as THE STAR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Question Presented for Review.

Whether the constitutional privilege accorded magazines in *Time, Inc. v. Hill*, 385 U.S. 374, extends to headlines in the magazine which merely label or describe its contents and which headlines do not themselves contain any comment, opinion or news.

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CHER,

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NEWS GROUP PUBLICATIONS, INC., a Delaware corporation, doing business as THE STAR,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 692 F.2d 634 (9th Cir. 1982), and is reproduced in the Appendix at pp. 1-11.

The opinion of the United States District Court for the Central District of California is not officially reported. It is unofficially reported at 7 Med. L. Rptr. 2593 (C.D. Cal. 1981), and is reproduced in the Appendix at pp. 12-27.

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[1]Other defendants-appellants in the Ninth Circuit Court of Appeals were Forum International, Ltd., a New York corporation, doing business as FORUM magazine; Penthouse International Ltd., a New York corporation, and Fred Robbins, an individual.

Jurisdiction of the Supreme Court.

The judgment of the District Court was entered on January 15, 1982. The opinion of the Ninth Circuit Court of Appeals was entered on November 18, 1982, and petitioner's Petition for Rehearing was denied on January 20, 1983. Jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1254(1), by writ of certiorari by a party to a civil case.

Constitutional and Statutory Provisions Involved.

The First Amendment to the Constitution of the United States provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances.

Section 43(a) of the Lanham Act, 15 U.S.C. Section 1125(a), provides in pertinent part as follows:

> (a) Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, . . . shall be liable to a civil action by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

Statement of the Case.

Petitioner, Cher, is a well-known entertainer who has performed publicly for many years as a singer, recording artist, television personality and entertainer. As such, there is a great deal of interest by the public worldwide in the events of Cher's life. (App. p. 13).

In early 1980, Cher agreed to an exclusive cover story and interview to be published in *US* Magazine. *US* Magazine thereupon hired Fred Robbins to tape an interview with Cher for this purpose. (App. p. 13). It was understood between Cher and Robbins that the interview was to be published in *US* Magazine (App. p. 14), and Cher was interested in having the story timed to reach the public about the same time Cher expected to release a new album. (App. p. 2).

However, the editors of *US* Magazine, at Cher's request, did not run the interview, as Cher did not feel it sufficiently emphasized her new band. (App. p. 2). Thereafter, without seeking or obtaining permission from Cher, Robbins sold the interview to *Forum* Magazine, a pocket-size magazine, which published the interview.[2] (App. pp. 2-3, 15).

Following publication in *Forum* Magazine, an editor at the *Star*, a tabloid sold at supermarket checkout stands, inquired of Robbins and thereupon purchased the interview for publication as a two-part series in the *Star*. (App. p. 18). Knowing that Cher had neither been contacted nor given any permission for the interview to be published in the *Star*, the *Star* nevertheless published a two-part series, utilizing a full-page color photograph of Cher on the cover of its March 17, 1981 issue along with the bold headline:

> "EXCLUSIVE SERIES
> CHER: My life, my husbands
> and my many, many men" (App. pp. 4, 18).

In the body of the magazine, other headlines appeared indicating that the purchaser of the *Star* could expect an

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[2]Cher's judgment against defendants Forum International, Ltd. and Penthouse International, Ltd. was upheld by the Ninth Circuit Court of Appeals on a separate theory and is, therefore, not before this Court in this Petition.

exclusive interview with Cher to the *Star*.[3]

Cher brought suit against the *Star* alleging diversity of citizenship, 28 U.S.C. § 1332(a)(1), as to state-law claims of misappropriation of name and likeness for commercial purposes and unfair competition, and violations of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), false designations of origin and false descriptions of goods in interstate commerce.

In a court trial, Judge Manuel L. Real found that the words and usages of the headlines were false and misleading, in that they stated and would convey the impression to readers of the *Star* that Cher chose to give an exclusive series of interviews about her life to the *Star* when, in fact, she had not. (App. p. 18). Judge Real also found that the publication by the *Star* was a willful and knowing falsification of facts and was done in conscious disregard for Cher's rights (App. p. 19). The Court noted that the *Star* had previously offered to pay Cher $100,000 for a series of exclusive interviews, which offer Cher turned down. (App. p. 19).

Judge Real concluded that the *Star's* acts constituted acts of misappropriation of name and likeness for commercial purposes. In addition, he held that they constituted violations of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), in that they were misleading statements about a product sold

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[3]Other headlines and introductory lines appearing in the body of the magazine and complained of herein include: (a) "TRUTH BEHIND MY FLINGS, AFFAIRS AND MARRIAGES, Cher talks about the men in her life since she was a 16-year-old groupie"; (b) "CHER: My life and loves — part one of a great STAR series"; (c) "SULTRY glitter queen Cher has revealed all about the stream of men in her glamorous life . . ."; (d) "In a revealing interview, the dark-eyed beauty tells . . ."; and (e) "Here, in the first of a two-part series, Cher talks openly about the many men in her life, and her unusual views about marriage after two failures." (See article, Trial Court Exhibit 8, not on file with this Court.)

in interstate commerce. (App. p. 23). The Judge concluded that the so-called "actual malice" test of *Time, Inc. v. Hill*, 385 U.S. 374, was not applicable, as the claim did not depend upon falsity in the sense involved in *Time*, but rather on commercial misappropriation of name and likeness and unfair competition. (App. p. 24).[4]

General and special damages of $169,117 were awarded, and punitive damages of $200,000 were awarded. (App. pp. 25-27, 28-29).[5]

The Ninth Circuit Court of Appeals reversed as to the *Star*. While recognizing that the claims of "exclusivity" by the *Star* were exaggerated (App. p. 5), the Court held it was privileged under the actual malice test of *Time, Inc. v. Hill*. The Court reasoned that the usage involved did not, as a matter of law, rise to the level of a knowing falsehood, as the article was based on an actual interview with Cher and the exact article as published had not appeared elsewhere. (App. p. 5).[6]

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[4]Notwithstanding the Judge's ruling that the "actual malice" test did not apply, the Judge did find that Cher had proven actual knowledge of the falsity of the statements and usages by the *Star* and that the *Star* knew that an "Exclusive Series" on Cher's life in the *Star* would be and was unauthorized.

[5]The District Court found that $100,000 was a fair measure of the value of the right to use Cher's name and likeness in the manner used (App. pp. 26-27), in that the *Star* had previously offered that sum to Cher for an exclusive series of interviews, which Cher had rejected (App. pp. 19, 26). The District Court also awarded $69,117 as the amount necessary to correct the false impression which was created in the minds of the public about Cher's giving an exclusive interview to the *Star*. This amount was calculated using a "corrective advertising" theory under a formula set out in more detail in Conclusion of Law No. 23 in the Appendix, at p. 26.

[6]The dispositive language by the Ninth Circuit on this issue was as follows:

> "Star was entitled to inform its readers that the issue contained an article about Cher, that the article was based on an interview with Cher herself, and that the article had not previously appeared elsewhere. It sought to do so by the use of the words, including 'Exclusive Series.' The use of these words cannot support a finding of the knowing or reckless falsity required under *Time, Inc. v. Hill*." (692 F.2d at 638, App. p. 5).

REASONS FOR GRANTING THE WRIT.

This case presents for the first time the question of whether a headline in a magazine may be deemed to be merely descriptive of the contents and origin of the article and, therefore, subject to the provisions of the Lanham Act, or whether a magazine headline is in all instances protected by the constitutional privilege accorded magazines announced in *Time, Inc. v. Hill*, 385 U.S. 374. In either case, the Court is concerned with the dissemination of false information. However, if the *Time* privilege attaches, a plaintiff must show that there has been a knowing falsehood or that the false statement was published with reckless disregard for its truth or falsity. (385 U.S. at 390). If, on the other hand, Lanham Act principles are followed, a plaintiff need not demonstrate intentional or reckless conduct, or even actual falsity, but only that the statement misleads or confuses the public as to the origin of product or of the plaintiff's contribution to the finished product. (*New West Corp. v. NYM Co. of Cal., Inc.*, 595 F.2d 1194, 1201 (9th Cir. 1979); *Geisel v. Poynter Products, Inc.*, 283 F.Supp. 261 (S.D.N.Y. 1968)).

The distinction which the Court is being asked to draw herein is that words which are merely descriptive of the contents of a magazine, or of a person's services in connection with a magazine article, are, in fact, words relating to the magazine as a product to be sold commercially to the public. Such words, if misleading, may be actionable under the Lanham Act and subject to the guidelines thereunder. On the other hand, if the words used are words expressing some comment, opinion, report of news, words of entertainment, or the like, the content of such words is subject to the rigorous standards and protections of *Time, Inc. v. Hill*.

It is Cher's argument herein that the words "EXCLUSIVE SERIES: CHER, My Life, my husbands and my many, many men", are words simply describing what the reader can be expected to read and from whom the "exclusive series" originated. Such words are in no way a comment on Cher or events in her life, nor do they even portray any facts, newsworthy or entertainment-oriented, about Cher. They simply describe that it is an exclusive series by Cher, wherein she will discuss events about her life directly to readers of the *Star*.

The ruling of the Ninth Circuit thus creates a conflict between the Lanham Act and the First Amendment, which should be settled by this Court. While the Lanham Act prohibits the false or misleading labelling of products sold in interstate commerce, the Ninth Circuit's rule, if allowed to stand, would apply such a prohibition to all products except the media. Presumably, the media could then "label" their products with descriptions misleading the purchaser as to its contents, unless it be demonstrated that the language used were actually false and published with actual knowledge of the falsity or with reckless disregard for the truth.

Whether the media is entitled to such First Amendment protections for language which merely labels the product or induces the public to purchase, is an important issue which this Court should resolve.

I.

THE DECISION BELOW FAILS TO APPLY THE PROVISIONS OF THE LANHAM ACT TO THE FACTS OF THE CASE.

While the Lanham Act has traditionally been applied to protect trademarks and tradenames, it is clear that its protections go farther and prevent "false designations or representations in connection with *any* goods or *services*." (Emphasis in original, *Smith v. Montoro*, 648 F.2d 602,

605 (9th Cir. 1981)). In the *Smith* case, the failure of a movie distributor to give one of the actors his proper acting credit was held to be a false designation as to the actor's service in connection with the film. (*Id.*) The *Smith* court specifically pointed out that the actor's name need not be officially registered to be actionable under § 43(a). (*Id.*)

The theory of recovery under this extension of the Lanham Act is that a person whose words or acts are being presented to the public via the media, has an interest in ensuring that his contribution to the finished product fairly represents his services. (*Smith v. Montoro, supra*, at 608; *Follett v. New American Library, Inc.*, 497 F.Supp. 304, 313 (S.D.N.Y. 1980);[7] *Benson v. Paul Winley Record Sales Co.*, 452 F.Supp. 516 (S.D.N.Y 1978)).[8] The courts have recognized that actors, authors, and other creative individuals have a fundamental right to prevent their works from being presented by the media to the public in a distorted form, or in a form which misleads the public concerning that person's role in or contribution to the work. (*Smith v. Montoro, supra*, at 608; *Follett v. New American Library, Inc., supra*, at 310-311, 313).

The misconception fostered by the *Star's* usage herein is that Cher chose the *Star* as a vehicle for giving an exclusive

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[7]In *Follett*, a book publisher designated plaintiff, a famous author, as the author of the book, when in fact he had only been a co-editor years before. The Court noted that "A performer has a property right in his performance that it shall not be used for a purpose not intended, and particularly in a manner which does not fairly represent his services." (497 F.Supp. at 311).

[8]In *Benson*, a record distributor sold a record under the title "George Benson, Erotic Moods", when, in fact, Mr. Benson had only taken part in the recording years before as a member of the jazz combo. The Court found it to be a violation of the Lanham Act, in that the public might believe that Benson was the primary musician and that he endorsed the blatant sexual appeal of the album, when the sexually suggestive sounds had been added in later. (452 F.Supp. at 517-518).

interview. Clearly, Cher cannot prevent the *Star* from writing truthful articles about her, but she has a right to control where her exclusive interviews are published. The *Star* may not present her interview to the public in a distorted form by implying that the interview is an exclusive to the *Star* when it is not.

The trial court found that the usage by the *Star* was, in fact, false and misleading in that it would convey to the reader that Cher chose to give an exclusive series of interviews about her life directly to the *Star* when, in fact, she had not. (App. p. 18). Furthermore, the trial court held that the language used by the *Star* indicated "an autobiographical article by Cher herself by saying 'my life, my husbands and my many, many men.' ". (App. p. 18). It is just this sort of misleading usage which the *Smith* case protects against.

II.

THE DECISION BELOW IMPROPERLY APPLIED THE "ACTUAL MALICE" TEST OF *TIME, INC. v. HILL.*

It is true that the public figure plaintiff suing over defamatory false statements of fact in a magazine must demonstrate that the false statements were made with knowledge of their falsity or in reckless disregard for the truth (*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1975); *Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)). However, the so-called "actual malice" test is not applicable in every case where a media publication publishes statements by or concerning a public figure.

In *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977), the Court, for example, refused to apply the standard at all in a case

involving an entertainer's "right of publicity", *i.e.*, the "personal control over commercial display and exploitation of his personality." (*Id.* at 569). Such an action was held to be "an entirely different tort" from the one described in *Time, Inc. v. Hill.* (*Id.* at 571). Similarly here, the court below improperly applied the "actual malice" test where the tort alleged sounded in "right of publicity" and unfair competition under the Lanham Act, and not libel or false light privacy, as in *Time*.

A. The States' and Federal Government's Regulation as to the Usage of Tradenames Is Not in Violation of the First Amendment.

While the First Amendment has been extended to certain forms of commercial speech, the misleading usage of tradenames has been held to be a proper subject of regulation and not violative of those protections. In *Friedman v. Rogers*, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979), the Court noted that the use of tradenames is a form of commercial speech. (*Id.* at 11). Where the usage of the tradename itself is not for the purpose of editorializing on a subject, cultural, philosophical, or political, or of reporting on any newsworthy fact, regulation as to the usage of tradenames was held not to violate the First Amendment. (*Id.*) The Court recognized that there is a need for regulation in such a case, as "there is a significant possibility that tradenames will be used to mislead the public." (*Id.* at 13). Thus, clearly the provisions of the Lanham Act are not in conflict with the First Amendment.

Here, the acts alleged are mislabelling of the contents of the magazine and a misuse of Cher's unregistered tradename. The *Star* misled the public by identifying the article as being an "Exclusive Series" and leading its readers to believe that if they purchased that issue, they could read

an authorized publication of Cher, speaking directly to *Star* readers. Cher's objection to this kind of misleading statement is made only with reference to the description of the product, the magazine, and of Cher's contribution to it. It is in no way an attempt to control what is said about Cher. It is, rather, an attempt to prevent the *Star* from capitalizing on Cher's great success, by encouraging readers to buy the *Star's* product in the mistaken belief that they will be reading an exclusive interview by Cher. This is nothing more than a form of unfair competition which the Lanham Act seeks to protect.

B. The Applicable Standard Under the Lanham Act Is Whether There Is Likelihood of Confusion.

The cases are clear that the test for liability under the Lanham Act is much more lenient than the "actual malice" test of *Time, Inc. v. Hill*. As stated in *New West Corp. v. NYM Co. of Cal., Inc.*, 595 F.2d 1194, 1201 (9th Cir. 1979), the Lanham Act precludes one from using another's distinctive mark or name "if it will cause a likelihood of confusion or deception as to the origin of the goods". (*Id.*) "Neither actual confusion nor intent is necessary to a finding of likelihood of confusion under the Lanham Act." (*Id.*) The public's belief that the mark's owner sponsored or otherwise approved the use of the trademark satisfied the confusion requirement. (*Dallas Cowboys, Etc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 205 (2d Cir. 1979)).

Liability under the statute is not restricted solely to descriptions and representations that are literally false, but relief may be granted where the actions merely create false impressions. (*Geisel v. Poynter Products, Inc.*, 283 F.Supp. 261 (S.D.N.Y. 1968)). In *Smith v. Montoro, supra*, the Ninth Circuit went so far as to hold that the prohibitions of

the Lanham Act "encompass any form of competition or selling which contravenes society's current concepts of fairness." (648 F.2d at 604).

Conclusion.

The important question before the Court is whether the media is to be treated any differently than any other product sold in interstate commerce in how it labels its products. Do the constitutional protections necessary to ensure that the content of the news and public debate be completely free and robust, go so far as to provide that the press can mislead the public as to what it can expect to read if it buys that media's product, free from dam ges except in the case of knowing falsehood? Should the press be allowed to profit from a practice of using headlines to lure purchases of their product, which are misleading as to one's contribution to the product? Should the press be free from damages in negligently making false statements at someone else's expense, but yet free to reap the profits of its own falsehoods?

Under the ruling of the Ninth Circuit, it would seem that the press would be so immunized. Whereas, the Lanham Act would require all vendors of goods or services to properly label their products, the Ninth Circuit would now, for the first time, carve out an exception only as to the media, for which it would give additional protection.

It is respectfully urged that the consequences of such a ruling are important enough for this Court to resolve by granting Certiorari herein.

Dated: April 19, 1983.

Respectfully submitted,

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Attorneys for Petitioner.

APPENDIX A.

Opinion of the Court of Appeals.

Cher, Plaintiff-Appellee, v. Forum International, Ltd., a New York corporation, dba Forum Magazine; Penthouse International, Ltd., a New York corporation; News Group Publications, Inc., a Delaware corporation, dba the Star; Fred Robbins, an individual, Defendants-Appellants. Nos. 82-5105, 82-5106, 82-5107.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Aug. 3, 1982. Decided Nov. 18, 1982.

Celebrity brought action against free-lance writer who had conducted an interview with her and against magazines which had published the interview. The United States District Court for the Central District of California, Manuel L. Real, J., entered judgment on verdict in favor of celebrity and magazines and writer appealed. The Court of Appeals, Goodwin, Circuit Judge, held that: (1) writer who had made no promises of interviewee approval rights and who had not participated with the publishers could not be held liable; (2) celebrity was not damaged by one magazine's assertedly exaggerated claims of exclusivity; (3) magazines were entitled to inform their readers that various issues contained articles about the celebrity; but (4) magazine appropriated right of publicity by falsely indicating that celebrity had told it things that she would not tell a rival magazine and by falsely indicating that she endorsed the magazine; and (5) magazines could be held liable in punitive as well as special and general damages.

Affirmed in part, modified in part, and reversed in part.

N. Roy Grutman, New York City, argued for Forum Intern., Ltd. and Fred Robbins; Paul, Hastings, Janofsky & Walker, Los Angeles, Cal., on brief.

Louis P. Petrich, Los Angeles, Cal., argued for Penthouse Intern., Ltd.; Youngham, Hungate & Leopold, Los Angeles, Cal., on brief.

John D. Forbess, Rudin, Perlstein & Chieffo, Beverly Hills, Cal., for Cher.

Appeal from the United States District Court for the Central District of California.

Before CHAMBERS and GOODWIN, Circuit Judges, EAST,* District Judge.

GOODWIN, Circuit Judge.

A well-known entertainer who performs under the name "Cher" sued a number of defendants for damages allegedly arising out of the unauthorized publication in two magazines of portions of an interview that she had given to a writer for a third, which did not use it. A court trial resulted in judgment for compensatory and punitive damages against all defendants. They appeal.

This controversy began when Fred Robbins taped an hour-and-a-half interview with Cher in Atlantic City. Robbins is a radio talk show host who interviews celebrities and sells the interviews, or parts of them, to as many magazines as possible. Robbins and Cher understood that the taped interview was to be published in *Us* magazine. Cher and her agents were apparently interested in having a cover story in that magazine, timed to reach the public about the same time Cher expected to release a new album.

The editors of *Us* magazine, at Cher's request, did not run the interview, and returned it to Robbins, paying him a "kill" fee. Cher apparently did not feel that the interview sufficiently emphasized her new band. Robbins sold the

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

interview to two of the defendants, the publishers of a tabloid called *Star*, and the publishers of a pocket-sized magazine called *Forum*.

Cher does not allege that the published text of the interview was false or defamatory. Nor does she contend that private facts were published without her consent. Instead her complaint charged breach of contract, unfair competition, misappropriation of name and likeness, misappropriation of right to publicity, and violations of the Lanham Act,[1] all with reference to the publishers' use of headlines, cover promotions and advertising in connection with the interview.

The trial court found for Cher and awarded general and punitive damages against all defendants. The court indulged in the regrettable practice of asking the winning lawyers to draw the findings of fact; so we do not know what the trial court would have said in its own words. We therefore give the findings special scrutiny. *United States v. State of Washington*, 641 F.2d 1368, 1371 (9th Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 1001, 71 L.Ed.2d 294 (1982); *Photo Electronics Corp. v. England*, 581 F.2d 772, 777 (9th Cir. 1978). After examining the record, we conclude that the evidence does not support the findings in their entirety, and the law does not support parts of the judgment.

(1) Fred Robbins

Robbins taped the interview with Cher with her consent and cooperation. She now says she gave that consent under the mistaken belief that the interview would appear as a cover story in *Us* magazine and she did not consent to other uses of the interview. The trial court found that Cher had

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[1]We decide the case on grounds other than the Lanham Act and therefore express no opinion on its applicability to these facts.

no contract with Robbins. We accept that finding. Moreover, it was stipulated that Robbins had never promised any interviewee approval rights over an interview. Accordingly, any liability of Robbins to Cher must be predicated upon a finding that Robbins participated in one or more of the tortious actions of the publisher defendants.

Robbins had no part in the publishing, advertising or marketing of the articles in question. Accordingly, the judgment against Robbins is clearly erroneous and must be vacated.[2]

(2) News Group Publications, Inc.

News Group Publications, Inc. publishes, among other things, a tabloid called *Star*. *Star* published portions of the Robbins interview in its March 17 and 24, 1981, issues and printed Cher's picture and these words on its March 17 cover: "Exclusive Series", followed by "Cher: My life, my husbands and my many, many men."

Cher's theory against News Group was that her image as a major celebrity was degraded by the suggestion that she would give an exclusive interview to that publication. Cher also claimed that News Group had wrongfully appropriated Cher's implied endorsement of *Star* for commercial purposes.

We note first that it was stipulated that "exclusive" interviews with Cher had previously appeared in *Star* a number of times. We also note that Cher conceded at trial that she had never been paid for an interview, and that *Star* had never paid an interviewee for an interview. Whether the article itself was an "exclusive", it was stipulated that the *Star* article had not previously appeared in any other pub-

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[2]Robbins also asserts that the court lacked personal jurisdiction over him. It is not necessary for us to address this argument in view of our disposition on the merits.

lication. Even if some of the material in *Star* had already appeared in *Forum*, Cher did not suffer any damage from *Star*'s exaggerated claims of exclusivity.

Star bought an interview with a public figure from a free-lance writer and published portions of it. This activity is protected by the First and Fourteenth Amendments in the absence of a showing that the publishers knew that their statements were false or published them in reckless disregard of the truth. *Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967). Cher makes no claim that *Star* published any statements from the interview with knowledge that they were false or with reckless disregard for their truth.

Cher's theory was that by using the words "Exclusive Series" and "Cher: My life, my husbands and my many, many men" on the cover of *Star*, the magazine was falsely representing to the public that Cher had given *Star* an exclusive interview.

Star was entitled to inform its readers that the issue contained an article about Cher, that the article was based on an interview with Cher herself, and that the article had not previously appeared elsewhere. It sought to do so by the use of words, including "Exclusive Series." The use of these words cannot support a finding of the knowing or reckless falsity required under *Time, Inc. v. Hill.*

Neither do the words in question constitute a false claim that Cher endorsed *Star* magazine. There is no evidence in the record to support such a theory. The district court in effect imposed liability on the basis of earlier negotiations between Cher and News Group relating to a contract for commercial advertising and Cher's endorsement of *Star*, to be aired on television. These negotiations were never concluded, and were not relevant in this case, where no endorsement was in fact shown.

The California statute governing the use of another's name or likeness for commercial purposes contains an express exception for news accounts. Cal.Civ.Code § 3344(d).

The California Supreme Court has subjected the "right of publicity" under California law to a narrowing interpretation which accords with First Amendment values. The Court has acknowledged that "the right of publicity has not been held to outweigh the value of free expression. Any other conclusion would allow reports and commentaries on the thoughts and conduct of public and prominent persons to be subject to censorship under the guise of preventing the dissipation of publicity value of a person's identity." *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal.3d 860, 873, 160 Cal.Rptr. 352, 359-360, 603 P.2d 454, 461-462 (1979) (Bird, J. concurring.) Cher has no claim based on *Star's* publication and exploitation of her interview with Robbins.

The judgment against News Group is reversed.

(3) Forum International, Ltd.

Forum International, Ltd., a New York corporation, published part of the Robbins interview in the March 1981 issue of *Forum*, identifying Robbins as the interviewer but changing the text so that *Forum* appeared as the poser of questions and Cher appeared as the respondent (apparently a common practice in the industry). The magazine printed Cher's picture on its cover with the words: "Exclusive: Cher Talks Straight." *Forum* also caused to be published advertising copy referring to Cher which is discussed below. Cher sued Forum International on two theories: (1) falsely creating and exploiting the impression that Cher had in fact given an exclusive interview directly to *Forum* when she had not; and (2) exploiting Cher's celebrity value to sell magazines without her consent by implying that she endorsed *Forum*.

Cher concedes that *Forum's* publication of the interview was protected by the First Amendment. As explained above with reference to News Group, this protection extends to *Forum's* use of headlines and cover display so long as the headlines and promotional devices were true or were not published with knowledge that they were false or in reckless disregard for their truth. It was stipulated that the photos used by *Forum* were purchased from an independent agency which owned them. Unlike *Star*, however, *Forum* also engaged in explicit advertising using Cher's name and picture. This advertising provided an alternate basis for liability.

Forum carried inside its March 1981 issue a subscription "tear out" opposite the following legend: "There are certain things that Cher won't tell People and would never tell Us. She tells Froum." This message was printed above a picture of Cher. The text of the ad included the following sentence: "So join Cher and FORUM's hundreds of thousands of other adventurous readers today."

The same legend and picture were used in an ad appearing in the February 1981 issue of *Penthouse*. The text of that ad included the sentence: "So take a tip from Cher and hundreds of thousands of other adventurous people and subscribe to Forum."

Forum was also the beneficiary of a display advertisement in the *New York Daily News* on February 18, 1981, which, next to her picture, stated: "Cher Never Told Anyone How She Played Kiss and Tell with Rock Star Gene Simmons . . . She Told Forum Magazine." The court found that both Forum International and Penthouse International participated in concocting and placing the above described advertising copy and concluded that they were liable for falsely implying that Cher had endorsed *Forum*.

California law permits recovery for the unauthorized use of one's likeness or name for commercial purposes. *Gug-*

lielmi, supra; Lugosi v. Universal Pictures, 25 Cal.3d 813, 160 Cal.Rptr. 323, 603 P.2d 425 (1979); *Fairfield v. American Photocopy Equipment Co.*, 138 Cal.App.2d 82, 291 P.2d 194 (1955); Cal.Civ.Code § 3344. No action under this theory will lie, however, solely for publication which is protected by the First Amendment.

Constitutional protection extends to the truthful use of a public figure's name and likeness in advertising which is merely an adjunct of the protected publication and promotes only the protected publication. *Guglielmi*, 160 Cal.Rptr. at 360, 603 P.2d at 462. Advertising to promote a news medium, accordingly, is not actionable under an appropriation of publicity theory so long as the advertising does not falsely claim that the public figure endorses that news medium. *Namath v. Sports Illustrated*, 48 A.D.2d 487, 371 N.Y.S.2d 10 (1975), *affirmed*, 39 N.Y.2d 897, 386 N.Y.S.2d 397, 352 N.E.2d 584 (1976), (no violation of right to publicity where magazine uses picture of celebrity who had previously appeared in magazine in subscription advertisement with heading "How to get Close to Joe Namath"). *Forum* would have been entitled to use Cher's picture and to refer to her truthfully in subscription advertising for the purpose of indicating the content of the publication, *Guglielmi, supra*, because such usage is protected by the First Amendment. But *Forum* was not content with honest exploitation of the fact that it possessed some pictures of Cher and an interview that she had given a writer. *Forum* falsely proclaimed to the readers of its advertising copy that Cher "tells *Forum*" things that she "would never tell *Us*." In view of the fact that Cher had intended to "tell" the rival magazine, *Us*, the very words in the interview, and had not "told" *Forum* anything, the advertising copy was patently false. This kind of mendacity is not protected by the First Amendment, and those defendants responsible for the placement and circu-

lation of the challenged advertising copy must look elsewhere for their protection.

The trial court found in effect that *Forum* or *Penthouse* published the ads in question with knowledge that they were false or in reckless disregard for their truth. Cher maintains that *Forum* falsely stated that Cher had actually endorsed that magazine. *Forum* contends that the statements which form the basis of Cher's complaint are vague and subject to numerous interpretations. For example, "So join Cher and FORUM's hundreds of thousands of other adventurous readers today" may readily be interpreted in several ways. The reader may understand this as an invitation to enjoy reading about Cher along with other readers or to read about Cher and other readers in *Forum*, which as a regular feature prints a large number of letters from readers. Similarly, "so take a tip from Cher . . ." is equivocal and could be interpreted to refer to what the reader will learn from reading about Cher in *Forum* magazine. Cher's own expert admitted that the other language in the ads—*e.g.*, "There are certain things that Cher won't tell People and would never tell Us. She tells Forum"—does not constitute an express endorsement. Nevertheless, the trier found that there was an implied endorsement of *Forum* in the words of the advertisement.

Because of the First Amendment implications in this case, we have examined the trier's findings with the extra care required in such cases. We are satisfied that the trier could find, from the record as a whole, that no matter how carefully the editorial staff of *Forum* may have trod the border between the actionable and the protected, the advertising staff engaged in the kind of knowing falsity that strips away the protection of the First Amendment. Whether we agree with the trier's finding of knowing falsity, or fall back a step to reckless disregard for the truth, there is enough evidence to support the material findings under Fed.R.Civ.P. 52 against Forum International, Ltd.

(4) Penthouse International, Ltd.

Cher's theory against Penthouse International was based on two aspects of Penthouse International's involvement with Forum International: (1) Penthouse International owns 80% of the stock of Forum International; and (2) *Penthouse*'s staff participated in the preparation of the advertisements which appeared in *Forum* and in *Penthouse*. For the same reasons that we sustain the trier's material findings against Forum International, we sustain the findings against Penthouse International. There was enough participation in the false advertising to permit Penthouse International to share Forum International's liability.

The remaining questions have to do with the measure of damages.

The challenged judgment provides that Cher:

(1) recover of defendants Forum International, Ltd., Penthouse International, Ltd., and Fred Robbins, jointly and severally, as special damages, the sum of $100,000, with interest;

(2) recover of defendants Forum International, Ltd. and Fred Robbins, jointly and severally, as general damages, the additional sum of $69,117, with interest;

(3) recover of defendant Forum International, Ltd., as exemplary damages, the additional sum of $100,000, with interest;

(4) recover of defendants News Group Publications, Inc. and Fred Robbins, jointly and severally, as special and general damages, the additional sum of $169,117, with interest;

(5) recover of defendant News Group Publications, Inc., as exemplary damages, the additional sum of $200,000, with interest;

(6) recover of defendant Fred Robbins, as exemplary damages, the additional sum of $25,000, with interest; together with costs against all defendants jointly and severally.

Because Fred Robbins did not participate in the activities found by the trial court to be wrongful, all portions of the judgment against Robbins are vacated.

We find no substantial flaw in the manner in which the trier found general and special damages against Penthouse International and Forum International. Accordingly, those parts of items (1) and (2) which impose general and special damages against Penthouse International and Forum International, with interest from January 15, 1982, at seven percent, are affirmed.

Some exemplary damages can be supported as punishment for the false advertising and promotional misrepresentations of those defendants. In view of the dollar amounts that are discussed in the evidence concerning situations when celebrities agree to commercialize their publicity value, we cannot say that the trier's assessment of $100,000 exemplary damages in item (3) against Forum is clearly erroneous.

All portions of the judgment against News Group Publications, Inc., are vacated.

Reversed in part, affirmed in part, and modified in part.

APPENDIX B.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

Cher, Plaintiff, v. Forum International, Ltd., a New York corporation, dba Forum Magazine; Penthouse International, Ltd., a New York corporation; News Group Publications, Inc., a Delaware corporation, dba the Star; Fred Robbins, an individual, Defendants. No. 81 1461 R.

Filed: January 15, 1982.

This action having been tried upon the facts by the Court without a jury, the Court does hereby find the facts and state separately its conclusions of law thereon, and directs the entry of the appropriate judgment, as follows:

FINDINGS OF FACT

1. Plaintiff Cher is a resident and citizen of California, residing within the Central District.

2. Defendant Fred Robbins (hereinafter referred to as "Robbins") is a citizen of New York.

3. Defendant Forum International, Ltd. (hereinafter referred to as "Forum") is a New York corporation. Forum publishes a monthly magazine entitled *Forum* Magazine, which is sold and distributed in interstate commerce and in the Central District of California.

4. Defendant Penthouse International, Ltd. (hereinafter referred to as "Penthouse") is a New York corporation. Penthouse is the parent corporation of Forum through a series of corporate ownerships. Penthouse publishes a magazine entitled *Penthouse* Magazine, which is sold and distributed in interstate commerce and in the Central District of California.

5. Defendant News Group Publications, Inc. (hereinafter referred to as "News Group") is a Delaware corporation. News Group publishes a weekly tabloid entitled the *Star*, which is sold and distributed in interstate commerce and in the Central District of California.

6. The amount in controversy in the within dispute is in excess of $10,000.

7. Cher is a well-known entertainer and has performed publically for many years as a singer, recording artist, television personality and entertainer. There is a great deal of interest by the public worldwide in the events of Cher's life. Cher has exploited and licensed to others the right to exploit her name, likeness and personality, and received compensation therefor. Cher has created a substantial public identification of her as a personality, a substantial goodwill and secondary meaning with the public, and a substantial commercial value in her name, likeness, personality and endorsement of products. The name and likeness of Cher and the single name "Cher" have come to be known and associated with plaintiff Cher and are readily identifiable with Cher and with her services as an entertainment personality.

8. In or before April, 1980, Cher, through her representatives, agreed with *US* Magazine to participate in a personal interview to be published as an exclusive cover story in *US* Magazine.

9. *US* Magazine assigned Robbins to conduct the interview of Cher for *US* Magazine and agreed to pay Robbins for conducting the interview. The idea for the interview of Cher for *US* Magazine did not originate with Robbins, but, rather, from discussions between Cher's agents and *US* Magazine.

10. As part of the agreement between Cher and *US* Magazine, it was agreed and understood by Cher, *US* Magazine, and Robbins, that it was a material condition of Cher's agreeing to give such interview that the interview appear as a cover story in *US* Magazine, that the interview was being given by Cher on the express condition that it appear only in *US* Magazine, and in no other publication at any time. Robbins, in conducting the interview, was acting in a capacity as an agent of *US* Magazine rather than in any capacity of a freelance journalist.

11. On or about April 4, 1980, Robbins conducted a tape recorded interview for *US* Magazine with Cher in Atlantic City (the "Interview"), and Robbins caused to be prepared a transcript of the Interview. In conducting said Interview, Robbins was acting in the capacity of an agent of *US* Magazine rather than as a freelance writer, and Robbins was aware that he was acting in such capacity.

12. Following the Interview, Cher notified *US* Magazine that she did not approve of the Robbins' Interview and requested that a new interview be conducted. *US* Magazine agreed not to publish the Robbins' Interview and a new interview was conducted and published in *US* Magazine.

13. Robbins was aware that Cher had requested of *US* Magazine that *US* Magazine not published the Robbins' Interview, and Robbins was aware that *US* Magazine had agreed to Cher's said request. Robbins requested permission from Cher to broadcast the Interview on his radio show, and Cher's permission was denied. However, Robbins did broadcast portions of the Interview on his radio show on four separate occasions after his request to Cher had been denied.

14. Notwithstanding any purported release of rights by *US* Magazine to Robbins, Robbins knew of the conditions

imposed by Cher under which she agreed to give the interview, and that any publication other than in *US* Magazine would require Cher's consent.

15. After Robbins was notified by *US* Magazine that it would not publish the Interview and returned the Interview to him, Robbins sold his Interview to Forum for publication in *Forum* Magazine. Robbins informed Forum that the Interview had been done originally for *US* Magazine.

16. At no time did Robbins contact or attempt to contact, in any manner, Cher or any of her representatives, to seek her consent, release or authorization to sell the Interview, or any portion thereof, to any publication other than *US* Magazine.

17. At no time did Forum or Penthouse contact, or attempt to contact, in any manner, Cher, or any of her representatives, to seek her consent, release or authorization for Forum to publish the Interview, or any portion thereof, in *Forum* Magazine as an exclusive interview to Forum.

18. Robbins submitted to Forum the entire transcript of the Interview, and Forum edited and altered the text of the transcript by designating "FORUM:" as the poser of questions and "CHER:" as the responder. *Forum* Magazine was not the poser of questions at the original Interview.

19. Penthouse employees coordinate all circulation efforts of *Forum* Magazine and prepare and cause to be published all advertisements for *Forum* Magazine, and did so in this instance. All circulation and advertising efforts of Penthouse are approved and authorized by Forum and each such effort in this instance was so authorized and approved.

20. In or about February, 1981, Penthouse and Forum caused to be created and placed for publication a newspaper advertisement advertising the purchase of *Forum* Magazine, which utilized Cher's name and likeness (hereinafter re-

ferred to as the "Newspaper Advertisement"). Said Newspaper Advertisement was placed and published in excess of one hundred times in at least twenty-seven newspapers around the United States and in Canada.

21. In or about February, 1981, Penthouse and Forum caused to be created and placed for broadcast, a radio advertisement advertising *Forum* Magazine and utilizing Cher's name (hereinafter referred to as the "Radio Advertisement"). Said Radio Advertisement was placed and broadcast in excess of seven hundred times over at least one hundred radio stations around the United States.

22. In or about February, 1981, Penthouse, and Forum caused to be created and placed for publication, a subscription advertisement for *Forum* Magazine which utilized the name and likeness of Cher, and express words and of endorsement by Cher of *Forum* Magazine, which subscription advertisement was published in the February, 1981, and the March, 1981, issues of *Penthouse* Magazine (hereinafter referred to as the "Penthouse Subscription Advertisement").

23. In or about February, 1981, Penthouse and Forum caused to be created and placed for publication an advertisement for subscriptions to *Forum* Magazine, which utilized the name and likeness of Cher, and express words of endorsement by Cher of *Forum* Magazine, which subscription advertisement was pubiished in the February, 1981, anx the March, 1981, issues of *Forum* Magazine (hereinafter referred to as the "Forum Subscription Advertisement").

24. Forum paid the sum of $65,745 for the Newspaper Advertisements and $143,123 for the Radio Advertisements for the March, 1981 issue of *Forum* Magazine, utilizing the name and likeness of Cher. If Forum were required to pay for the Penthouse Subscription Advertisement and the Forum

Subscription Advertisement, it would have been required to pay the sums of $30,000 and $3,800 respectively for each usage. The total advertising cost for advertisements utilizing the name and/or likeness of Cher was $276,468.

25. Forum and Penthouse caused all of the above-described advertisements to be published and broadcast without the consent of Cher, and Forum and Penthouse knew that Cher had never so consented. No efforts of any kind were made by Forum or Penthouse to seek consent, release or authorization from Cher or any of her representatives for such usages.

26. The words, usages and configurations on the *Forum* Magazine cover, in the interview and in the advertisements are false and misleading in that they directly stated and would convey the impression to at least a substantial number of readers of *Forum* Magazine and the advertisements described above that Cher chose to and did give an exclusive interview directly to *Forum* Magazine, when, in fact, she did not; that Cher endorses, approves and recommends the purchase of *Forum* Magazine, when, in fact, she does not; and that she is a reader and a satisfied reader of *Forum* Magazine, when, in fact, she is not.

27. The intent, design and purpose of Forum's and Penthouse's advertisements utilizing Cher's name and likeness was to trade upon and commercially exploit Cher's name, likeness, public recognition and public identification in order to induce the public to purchase *Forum* Magazine; to use Cher's name and likeness as an "attention getter" for said advertisements and thereby increase their value to Forum and Penthouse; and to create for Forum's and Penthouse's commercial benefit, an identification between Cher and *Forum* Magazine.

28. Penthouse and Forum caused the subject cover, article and advertisements to be published with actual knowl-

edge of their falsity and with actual knowledge that their usages were not authorized by Cher.

29. The usages by Forum and Penthouse in publishing the cover and article in the March, 1981 issue of *Forum* Magazine and in publishing the subject advertisements, were a willful, knowing and intentional misappropriation of Cher's name and likeness, willful and knowing false statements of facts, and a blatant violation and conscious disregard for the rights of Cher.

30. The fair market value of the right to use Cher's name and likeness in the manner in which use was made herein by Forum and Penthouse is $100,000.

31. In or about February, 1981, News Group, aware of the existence of the Forum article, solicited from Robbins the purchase of the Interview. Thereafter, Robbins sold the Interview to News Group for use as a two-part series in the *Star*.

32. No representative of News Group had any contact or attempted to make any contact in any manner with Cher or her representatives prior to publication of the article in the *Star*, to seek her consent, release or authorization for the *Star* to publish the Interview or any portion thereof in the *Star*.

33. The words, usages and configurations in the March 17, 1981 cover and article and the March 24, 1981 article in the *Star* are false and misleading in that they stated and would convey the impression to at least a substantial number of readers of the *Star* and to members of the public viewing the cover of the *Star*, that Cher chose to and did give an exclusive series of interviews about her life directly to the *Star* when, in fact, she had not. The language also indicated an autobiographical article by Cher herself by saying "My life, my husband and my many, many, men."

34. Some of the quotations of Cher appearing in the March 17, 1981 and March 24, 1981 issues of the *Star* had already appeared in the March, 1981 issue of *Forum* Magazine, which was published and in circulation before News Group purchased the Interview from Robbins and before publication of the subject articles in the *Star*.

35. In or about November, 1979, News Group had made a proposal to Cher that Cher cooperate with the *Star* in a four or five part exclusive series on her life for payment to Cher of the sum of $100,000. News Group's proposal was rejected by Cher.

36. News Group published its March 17, 1981 and March 24, 1981 issues of the *Star* with actual notice and knowledge of the falsity of their statements and usages, and News Group knew that an "exclusive series" on Cher's life in the *Star* would be, and was, unauthorized by Cher.

37. The usages by News Group in publishing the cover and article in its March 17, 1981 issue and the article in its March 24, 1981 issue of the *Star*, were a willful, knowing and intentional misappropriation of Cher's name and likeness, willful and knowing false statements of facts, and a conscious disregard for the rights of Cher.

38. The manner of selling copies of the *Star* at supermarket checkout stands encourages purchasers to purchase the *Star* in part depending upon the content of the cover. The inducement to purchase the March 17, 1981 issue of the *Star* was dependent in part upon the false impressions generated by the improper usages of Cher's name and photograph, in much the same manner as is an inducement to purchase from an advertisement.

39. The acts of Robbins were a willful, knowing and intentional misappropriation of Cher's name and likeness and conscious disregard of the rights of Cher.

40. The fair market value of the right to use Cher's name and likeness in the manner in which use was made herein by News Group is $100,000.

41. The uses of Cher's name and likeness by Forum and News Group complained of herein, were solely for purposes of enhancing the sales of *Forum* Magazine and the *Star* respectively, for a commercially exploitive effect, rather than for the purpose of informing the public about a newsworthy event.

42. The words, usages and configurations by Forum, Penthouse and News Group herein, caused actual confusion and caused readers thereof to believe that Cher had given exclusive interviews directly to *Forum* Magazine and to the *Star* and that Cher had endorsed *Forum* Magazine.

43. By virtue of the false impressions created by defendants, Cher was subjected to personal consternation, frustration and humiliation.

44. The following conclusions of law insofar as they may be considered findings of fact are so found by this Court to be true in all respects.

CONCLUSIONS OF LAW

1. This is an action brought within the jurisdiction of this Court pursuant to 28 U.S.C. §§1131, 1338 and 15 U.S.C. §1121, with respect to those claims arising under 15 U.S.C. §1125(a) (The Lanham Act), the doctrine of pendent jurisdiction, and pursuant to 28 U.S.C. §1332 (diversity of citizenship).

2. Other than those claims arising under Federal law, the law of the State of California is applicable herein.

Misappropriation of Right of Publicity

3. The law affords protection to an individual's proprietary interest in his own identity (*Motschenbacher v. R. J. Reynolds Tobacco Company*, 498 F.2d 821, 825 (9th Cir.

1974)). The right of a person to the use of his name and likeness is a right of value upon which plaintiff can capitalize by selling licenses (*Lugosi v. Universal Pictures*, 25 Cal.3d 813, 819, 160 Cal.Rptr. (1970)).

4. A celebrity or other public figure has the right to control the publicity and establish conditions for the use of his or her name and likeness when he or she chooses voluntarily to give an "exclusive interview" to a particular publication. That celebrity has the right to delineate the conditions and controls over such usage by the publication. Any subsequent usage by the publication, or by a third party who has knowledge of the existence of any such conditions or controls, not in accordance with such delineation, and without the consent of the celebrity, is a wrongful appropriation of the commercial value of the celebrity's identity and right of publicity.

5. The publication of the March, 1981 issue of *Forum* Magazine, and the publication of the Newspaper Advertisement, the Radio Advertisement, the Penthouse Subscription Advertisement and the Forum Subscription Advertisement, constituted a misappropriation of Cher's right of publicity by Forum and Penthouse. Penthouse is liable as a joint tortfeasor with Forum by reason of its direct participation in the preparation and placement of the advertisements, and in publishing the Penthouse Subscription Advertisement knowing it to be false and a misappropriation of Cher's rights.

6. The publication of the March 17, 1981 cover and article and the March 24, 1981 article in the *Star* constituted a misappropriation of Cher's right of publicity by News Group.

7. Robbins is also liable for misappropriation of Cher's right of publicity because the Interview was given to him

in his capacity as an agent of *US* Magazine, with the full knowledge of the exclusiveness of the interview to *US* Magazine. The subsequent usage of such Interview, without Cher's consent, constitutes a misappropriation, and Robbins is liable for the consequences thereof. Robbins is jointly and severally liable with Forum and News Group for the general and special damages assessed against them.

Misappropriation for Advertising

8. In California, the use of a person's name, photograph or likeness for advertising purposes without consent is prohibited by statute and common law (California Civil Code §3344; *Fairfield v. American Photocopy, Etc., Co.*, 138 Cal.App.2d 82, 85, 291 P2d 194 (1955)).

9. The publication of the Newspaper Advertisement, the Radio Advertisement, the Penthouse Subscription Advertisement and the Forum Subscription Advertisement constituted a knowing and willful misappropriation of Cher's name and likeness for advertising purposes by Forum and Penthouse.

10. Such misappropriation exists even if, *arguendo*, the initial cover and article were not unlawful as to Cher. The advertising is not merely "incidental" to the original publication and the express words of endorsement and other usages go much further than establishing the news content and quality of the periodical (*Namath v. Sports Illustrated*, 80 Misc.2d 531, 363 N.Y.S.2d 276 (1975), aff'd 39 N.Y.2d 897, 386 N.Y.S.2d 397 (1976)).

11. By reason of Penthouse's direct participation in the preparation and placement of these advertisements, and by its publication of the Penthouse Subscription Advertisement knowing it to be false and a misappropriation, Penthouse is liable as a joint tortfeasor with Forum. Robbins is liable jointly and severally for the consequences of his acts.

Lanham Act Violations

12. The actions of Forum, Penthouse and News Group constitute violations of Section 43(a) of the Lanham Act. Although Section 43(a) is contained in the Lanham Act, which primarily relates to federally registered trademarks, liability under Section 43(a) may arise for a false description or representation even though no trademark is involved (*Smith v. Montoro* 648 F.2d 602, 605, fn. 3 (9th Cir. 1981)). Moreover, the names of movie actors and other performers may, under certain circumstances, be registered under the Lanham Act as service marks for entertainment services (See, e.g. *Re Carson*, 197 U.S.P.Q. (BNA) 554.) Although Cher has not alleged that her name is registered as a service mark, registration of a trademark or service mark is not a prerequisite for recovery under Section 43(a) (*Smith, supra.*, 648 F.2d at 605). Additionally, the plaintiff under Section 43(a) need not be in actual competition with the alleged wrongdoer (*Smith, supra.*, 648 F.2d at 607).

13. The Lanham Act extends to misrepresentations in advertising as well as labelling of products and services in commerce (*Benson v. Paul Winley Record Sales Corp.*, 452 F.Supp. 516, 517 (S.D.N.Y. 1978)). The Lanham Act proscribes any false designation or representation in connection with any goods or services in interstate commerce (*Smith v. Montoro, supra.*, 648 F.2d at 604).

14. Penthouse is liable as a joint tortfeasor by virtue of its direct participation in the preparation and placement of the advertisements, and by its publication of the Penthouse Subscription Advertisement knowing it to be false and a misappropriation. Robbins is liable jointly and severally for the consequences of his acts.

Unfair Competition

15. California Business and Professions Code §17200 defines unfair competition as including "unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising . . . ." In California, it is also an act of unfair competition for a person to induce the public to purchase a product by making an untrue or misleading statement in any newspaper or other publication (California Business and Professions Code §17500). The California Unfair Competition Law is extremely broad, encompassing any unlawful, unfair or deceptive business practice (*Barquis v. Merchants Collection Assn.*, 7 Cal.3d 94, 111, 101 Cal.Rptr. (1972)).

16. The acts of Forum, Penthouse and News Group constituted acts of unfair competition. Penthouse is liable as a joint tortfeasor by virtue of its direct participation in the preparation and placement of the advertisements, and by publishing the Penthouse Subscription Advertisement knowing it to be false and a misappropriation. Robbins is liable jointly and severally for the consequences of his acts.

Constitutional Privilege

17. In an action for invasion of right of privacy, which depends for its existence upon some element of falsity, a public figure must prove actual malice, that is, knowledge or reckless disregard for the truth, in order to recover against a media defendant (*Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967)). However, where the claim does not depend upon an element of falsity in the sense involved in *Time, Inc. v. Hill*, but is rather an appropriation of name and likeness for commercial purposes, the actual malice standard is not applicable (*Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977), *National Bank of Com-*

merce v. Shaklee Corp., 503 F.Supp. 553, 540 (W.D. Tex. 1980)).

18. The privilege of using a public figure's picture in connection with an item of news does not extend to commercialization of his personality through a form of treatment distinct from the dissemination of news or information (*Ali v. Playgirl*, 447 F.Supp. 723, 727 (S.D.N.Y. 1978)). A person is not stripped of his or her rights merely because he becomes a public figure, and the actual malice requirement does not extend to situations where, as here, the name of a public figure is being used in an exploitative, commercial fashion (*Lerman v. Chuckelberry Pub. Inc.*, 496 F.Supp. 1105, 1110 (S.D.N.Y. 1980)).

19. The rationale for protecting the right of publicity is the straightforward one of preventing unjust enrichment by the theft of goodwill. No social purpose is served by having defendants get for free some aspect of Cher that has market value and for which they would normally pay (*Zacchini v. Scripps-Howard Broadcasting Co., supra.*, 433 U.S. at 576).

20. Even assuming, *arguendo*, that the actual malice test were applicable herein, and to the extent it may be applicable to the false statements of fact, Cher has satisfied the requirements of that test by establishing the defendants' actual knowledge of the falsity of their statements and usages or reckless disregard for the truth.

Damages

21. Cher is entitled to general, special and exemplary damages, against Robbins, Forum and News Group and to special damages against Penthouse, as well as costs of suit against all defendants.

(a) *General Damages*

22. Defendants Robbins, Forum and News Group are liable for damage to Cher for having falsely stated and having created the wrongful impression in the minds of the

public that Cher gave exclusive interviews to *Forum* Magazine and to the *Star*. Forum is additionally liable for creating the wrongful impression that Cher endorsed *Forum* Magazine.

23. The amount of damages necessary to reasonably compensate Cher for the injury suffered by her as a result of the wrongful, false impressions created by defendants in the mind of the public is within the discretion of this Court. A fair approximation of the measure of damages that would be necessary to conduct a reasonable corrective advertising campaign to inform the public that the usages by defendants were wrongful, and of the true facts. In other cases the court have awarded a sum equal to twenty-five percent of the cost of defendant's wrongful initial advertising (*Big O Tire Dealers v. Goodyear Tire & Rubber Co.*, 561 F.2d 1365, 1374 (10th Cir. 1977)). In this case, the value of Forum's false, misleading and wrongful advertising using Cher's name and likeness, was $276,468 and, thus, an award of $69,117 is appropriate to Cher against Robbins and Forum.

24. The effect of and injury to Cher by the false, misleading and wrongful usage of Cher's name and likeness by News Group is similar to an extensive advertising campaign. Thus, in the Court's discretion, an award of $69,117 is an appropriate measure of general damages against Robbins and News Group.

(b) *Special Damages*

25. Defendants Robbins, Forum, News Group and Penthouse are liable for special damages to Cher for the reasonable value of their wrongful usage of Cher's name and likeness.

26. In the case of the usage by News Group, the value has been established by News Group itself in its prior negotiations with representatives of Cher. Dmages for the

value of the usage of Cher's name and likeness against News Group and Robbins are $100,000.

27. Damages against Forum, Penthouse and Robbins for the value of the usage of Cher's name and likeness are $100,000.

(c) *Exemplary Damages*

28. In California, exemplary damages are recoverable for torts where defendant's acts are carried on with a conscious disregard for the rights of plaintiff or by means of an intentional misrepresentation or deceit (California Civil Code §3294).

29. Exemplary damages against Forum shall be in the amount of $100,000, against News Group in the amount of $200,000 and against Robbins in the amount of $25,000.

(d) *Costs of Suit*

30. Cher's awarded costs of suit herein incurred against all defendants.

31. Any conclusions of law contained in the Findings of Fact are incorporated herein by reference.

Let judgment be entered accordingly.

Dated this 15th day of January, 1982 at Los Angeles, California.

Manuel L. Real
United States District Judge

APPENDIX C.

Judgment.

United States District Court, Central District of California.

Cher, Plaintiff, vs. Forum International, Ltd., a New York corp., d/b/a/ Forum Magazine; Penthouse International, Ltd., a New York corp., News Group Publications, Inc., a Delaware corp., d/b/a the STAR; Fred Robbins, an individual, Defendants. No. 81 1461 R.

Filed: January 15, 1982.

This action came on for trail before the Court, Honorable Manuel L. Real, District Judge, presiding, and the issues having been duly tried and the Court having made its findings of fact and conclusions of law,

It is Ordered and Adjudged:

1. That the plaintiff, Cher, recover of defendants Forum International, Ltd., Penthouse International, Ltd., and Fred Robbins, jointly and severally, as special damages, the sum of $100,000, with interest thereon at the rate of seven per cent per annum as provided by law;

2. That the plaintiff, Cher, recover of defendants Forum International, Ltd. and Fred Robbins, jointly and severally, as general damages, the additional sum of $69,117, with interest thereon at the rate of seven per cent per annum as provided by law;

3. That the plaintiff, Cher, recover of defendant Forum International, Ltd., as exemplary damages, the additional sum of $100,000, with interest thereon at the rate of seven per cent per annum as provided by law;

4. That the plaintiff, Cher, recover of defendants News Group Publications, Inc. and Fred Robbins, jointly and severally, as special and general damages, the additional sum

of $169,117, with interest thereon at the rate of seven per cent per annum as provided by law;

5. That the plaintiff, Cher, recover of defendant News Group Publications, Inc., as exemplary damages, the additional sum of $200,000, with interest thereon at the rate of seven per cent per annum as provided by law;

6. That the plaintiff, Cher, recover of defendant Fred Robbins, as exemplary damages, the additional sum of $25,000, with interest thereon at the rate of seven per cent per annum as provided by law;

7. That the plaintiff, Cher, recover of defendants Forum International, Ltd., Penthouse International, Ltd., News Group Publications, Inc., and Fred Robbins, jointly and severally her costs of action.

Dated at Los Angeles, California, this 15th day of January, 1982.

[Stamp] MANUEL L. REAL
Judge of the United
States District Court

APPENDIX D.

Order.

United States Court of Appeals for the Ninth Circuit.

Cher, Appellee, v. Forum International, Ltd., a New York corporation, dba Forum Magazine: Penthouse International, Ltd., a New York corporation; News Group Publications, Inc., a Delaware corporation, dba The Star; Fred Robbins, an individual, Appellants. No. 82-5105; Nos. 82-5106, 82-5107/

Filed: January 20, 1983.

Before: CHAMBERS and GOODWIN, Circuit Judges and EAST*, District Judge

The petition for rehearing of appellants Forum International and Penthouse International, Ltd. is denied.

The full court has been advised of appellee Cher's suggestion for en banc rehearing and no judge has requested a vote on whether to rehear the case en banc. (Fed. R. App. P. 35.)

Cher's petition for rehearing and suggestion for rehearing en banc is also denied.

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No. 82-1740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CHER,

Petitioner,

—vs.—

NEWS GROUP PUBLICATIONS, INC., a Delaware corporation doing business as THE STAR,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 82-1740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CHER,

Petitioner,

—VS.—

NEWS GROUP PUBLICATIONS, INC., a Delaware corporation doing business as THE STAR,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

This brief is submitted on behalf of respondent News Group Publications, Inc.,[1] in opposition to the petition by Cher for a writ of certiorari to the United States Court of Appeals for the

1 Pursuant to Rule 28.1 of the Rules of this Court, respondent has one subsidiary corporation entitled New York Magazine Company, Inc., is a wholly-owned subsidiary of News America Publishing Incorporated, and has the following domestic affiliates: The Express—News Corp., News Group Productions, Inc., Houston Community Newspapers, Inc., World Printing Co., Inc., World Publishing Services, Inc., Leisure Systems, Inc., San Antonio Film Features, Inc., News Group Boston, Inc., and News Air, Inc.

Ninth Circuit. The petition asks this Court to engraft trademark and unfair competition principles upon undisputed editorial practices, historically governed by First Amendment protections. The adoption of this theory would seriously undermine this Court's long-standing interpretations of the First Amendment and impair the uninhibited, robust, and wide-open debate on public issues that is the hallmark of American democracy.

ARGUMENT

I

AS EDITORIAL MATTER, MAGAZINE HEADLINES COMMAND FIRST AMENDMENT PROTECTION

The court below in a well-reasoned opinion rejected petitioner's claim that her right of publicity had been violated. As a result the sole question now presented is whether Section 43(a) of the Lanham Act (15 U.S.C. § 1125[a]) regulates the wording of headlines related to articles published in magazines. No fair reading of the statute justifies such contention. But assuming, *arguendo,* that it did, this Court should not permit such an incursion into the historic protection of the First Amendment for dissemination of information of general interest to the reading public.

The Court has long resisted attempts by statute or judicial fiat to cut back First Amendment protections. *See, e.g., Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974) (a state statute requiring a newspaper to publish a reply to an editorial, was unconstitutional); *Nebraska Press Association* v. *Stuart,* 427 U.S. 539 (1976) (a court order barring the publication or broadcast of confessions or admissions made by a criminal defendant, was unconstitutional); *New York Times Co.* v. *United States,* 403 U.S. 713 (1971) (a court order prohibiting a newspaper from publishing information contained in a governmental study concerning the Vietnam war, was unconstitutional); *Globe Newspaper Co.* v. *Superior Court,* ____ U.S.

____, 102 S. Ct. 2613 (1982) (a state statute mandating exclusion of the press and the public from the courtroom during trial testimony of minor victims of certain sexual offenses, was unconstitutional as a violation of the First Amendment).

The First Amendment protects magazines and newspapers against statutes which limit other businesses. In striking down a state statute which permitted newspapers to be enjoined as a nuisance, this Court stated that:

> "The administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities."

Near v. *Minnesota,* 283 U.S. 697, 719-20 (1931). The Court in that case responded to an argument similar to petitioner's by stating: "Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint." *Id.* at 720.

In 1936, the Court, while invalidating a Louisiana statute which taxed newspapers having a circulation in excess of 20,000 copies per week, stated:

> The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.
>
> * * *
>
> A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

Grosjean v. *American Press Co.*, 297 U.S. 233, 250 (1936). As this Court has reaffirmed only this Term, "We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Minneapolis Star & Tribune Company* v. *Minnesota Commissioner of Revenue*, ____ U.S. ____, 103 S.Ct. 1365, 1376 (1983).

Petitioner would have this Court separate headlines from the articles to which they relate and thus exclude them from constitutional coverage. Newspapers and magazines are protected root and branch. Photographs, captions, and headlines are all entitled to the same constitutional protection as the actual wording of the articles themselves.

II

EDITORIAL HEADLINES ARE NOT GOVERNED BY § 43(a) OF THE LANHAM ACT

Petitioner seeks to penetrate these First Amendment safeguards by characterizing the headlines accompanying the *Star's* article on Cher's life as being mere "labels", devoid of any news value, as if alerting the purchaser to the contents of the story, like the label on a jar on the store shelf. She bases this novel claim on the wording of the Lanham Act, which exposes to civil suit any person who uses "in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation. . . ." (15 U.S.C. § 1125[a]).

Petitioner has admitted throughout this case that the statements in the article were neither false nor defamatory (*see* Appendix annexed to the Petition ["App."] p.5). As the court below stated, "Cher's theory was that by using the words 'Exclusive Series' and 'Cher: My life, my husbands and my many, many men' on the cover of *Star,* the magazine was falsely representing to the public that Cher had given *Star* an

exclusive interview." (App. p.5). Cher did not argue that the headline on the cover of the *Star* and the other headlines inside the publication (Petition ["Pet."] p.4) accurately told the reader about the *content* of the article. Rather she argued that the cover headline falsely stated her relationship with the *Star* and implied that she endorsed the *Star.*

These headlines performed their normal editorial function. In sprightly fashion, they informed the reader that the March 17, 1981 issue of the *Star* contained an article about the entertainer Cher and her experiences with her husbands and other men in her life. Petitioner herself admits (even boasts) that "there is a great deal of interest by the public worldwide in the events of Cher's life." (Pet. p.2).

The role of a headline is to inform the reader of the content of the article to which it is related. In effect, a headline is a capsulized version of what is to follow. "A headline should be concise, descriptive of the text, and arresting. It should be 'a fair index of the matter contained in a truthful report'." *Paris v. New York Times Co.,* 170 Misc. 215, 9 N.Y.S. 2d 689, 692 (N.Y. Sup. Ct. 1939), *aff'd,* 259 App. Div. 1007, 21 N.Y.S. 2d 512, *motion for leave to appeal denied,* 260 App. Div. 859, 23 N.Y.S. 2d 479 (1st Dept. 1940).

The information that a headline transmits is newsworthy and of interest to the general public, and not merely a descriptive label. Headlines and their accompanying articles have been construed together in libel actions to determine whether they convey a defamatory meaning. " 'The rule is general that both the headline and the item to which it is attached are to be considered as one document in determining the effect of an article complained of as being defamatory.' " *Cole Fischer Rogow, Inc.* v. *Carl Ally, Inc.,* 29 A.D. 2d 423, 426, 288 N.Y.S. 2d 556, 561 (1st Dept. 1968), *aff'd,* 25 N.Y. 2d 943, 252 N.E. 2d 633, 305 N.Y.S. 2d 154 (1969). Headlines which are a fair index of information contained in a truthful article are not actionable. *Schermerhorn v. Rosenberg,* 73 A.D. 2d 276, 287,

426 N.Y.S. 2d 274, 283 (2d Dept. 1980); *Lawyers' Co-Operative Publishing Co. v. West Publishing Co.*, 32 App. Div. 585, 590, 52 N.Y.S. 1120, 1123 (4th Dept. 1898) ("In determining whether headlines prefixed to a report are fair, they and the matter to which they refer must be construed together.") Headlines are clearly protected by the First Amendment.

Petitioner argues that an exclusion for headlines from Lanham Act application would create a special exemption for the media. In fact, that exemption was created almost two hundred years ago when the First Amendment was adopted. A headline is purely editorial matter, entitled to the same constitutional protections as the words in the actual article. A headline is not like a name on a record jacket (*see, Benson* v. *Paul Winley Record Sales Corp.*, 452 F. Supp. 516 [S.D.N.Y. 1978]), nor like an acting credit at the end of a movie (*see, Smith* v. *Montoro*, 648 F.2d 602 [9th Cir. 1981]), nor like an author credit on a book (*see, Follett* v. *New American Library, Inc.*, 497 F. Supp. 304 [S.D.N.Y. 1980]), nor even like the trademark-title of a magazine (*see, New West Corp.* v. *NYM Company of California, Inc.*, 595 F.2d 1194 [9th Cir. 1979]).

One district court has considered a claim under similar facts based, *inter alia*, upon § 43(a) of the Lanham Act. In *Hicks* v. *Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978), the heir and assignees of the property interests of noted mystery writer Agatha Christie sought to enjoin the distribution of a movie and a book which provided a fictionalized account of the disappearance of Mrs. Christie for eleven days in December, 1926. The plaintiffs alleged that "the defendants' use of the name 'Agatha' and 'Agatha Christie' would cause confusion in the minds of the public in general, and Agatha Christie readers in particular, to the effect that the movie and novel were authorized or even written by Mrs. Christie." *Id.* at 433. The court found that the plaintiffs could not prove any facts to support their claim under the Lanham Act, and it denied the motion for a preliminary injunction and dismissed the claim.

Although no other lower court apparently has addressed the issue of Lanham Act regulation of obviously editorial matter,[2] some lower courts have rejected claims for appropriation of a celebrity's right of publicity [in essence, a commercial cause of action] when the use of the person's name or likeness was in an editorial context. *E.g., Ann-Margret* v. *High Society Magazine, Inc.*, 498 F. Supp. 401, 406 (S.D.N.Y. 1980). *Accord, Hicks* v. *Casablanca Records, supra,* 464 F. Supp. at 430. Although this Court did rule in *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) that the broadcast of the *entire* act of a performer at a county fair might abridge the performer's right of publicity, it did recognize the continuing First Amendment protection for a report of the performer's act. "It is evident, and there is no claim here to the contrary, that petitioner's state-law right of publicity would not serve to prevent respondent from reporting the newsworthy facts about petitioner's act." *Id.* at 574. Here, the *Star's* article and accompanying headlines were a report on the newsworthy facts of the life of the entertainer Cher. Indeed, the report was drawn from her own words.

The court below correctly stated that the First Amendment protection extends to the "use of headlines and cover display so long as the headlines and promotional devices were true or were not published with knowledge that they were false or in reckless disregard for their truth." (Pet. p.7).

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2 A review of the legislative history of the Lanham Act does not disclose *any* discussion of the applicability of that Act to editorial matters, including headlines. It is reasonable to conclude that the notion that its provisions might cover publications protected by the First Amendment was just too far-fetched to occur to any member of Congress.

III

THE *STAR*'S HEADLINES WERE NEITHER FALSE NOR MISLEADING

Petitioner urges in her petition that since this is not a false light privacy nor a libel case that this Court's "actual malice" standard as initially enunciated in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964) and later invoked in *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967) is not applicable here. Petitioner would have this Court impose the Lanham Act's "likelihood of confusion" standard, arguably easier to meet than a showing of knowledge of falsity or reckless disregard of the truth. Even under such a standard, petitioner's position has no merit.

The headline, as the Court of Appeals aptly noted, conveyed to the reader information as to the content of the article: "*Star* was entitled to inform its readers that the issue contained an article about Cher, that the article was based on an interview with Cher herself, and that the article had not previously appeared elsewhere. It sought to do so by the use of words, including 'Exclusive Series'." (App. p.5) It is important to note that the cover headline read "Exclusive Series" and *not* "Exclusive Interview."[3] It had been stipulated that the article as it appeared in the *Star* "had not previously appeared in any other publication." (App. pp. 4-5).

The headline on the cover of the *Star* was an accurate summary of what the reader would see upon reading the article, and could never be actionable under the Lanham Act.

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3 The court below noted that the *Star* had previously published a number of "exclusive" interviews with Cher, and that she had never been paid by the *Star* for any of these interviews. (App. p. 4)

CONCLUSION

The well-reasoned opinion of the court below should not be disturbed by a theory which would impose a business regulatory statute upon purely editorial matter. Petitioner has not shown either that the Lanham Act was ever intended to apply to editorial matter or that, even if it did, the cover headline on the *Star* was false or misleading. It is respectfully requested that this Court deny the within petition for a writ of certiorari.

Dated: May 17, 1983

Respectfully submitted,

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